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No.

in the

Supreme Court

of the

United States

EDUARDO V. SAENZ,

Petitioner,

vs.

UNITED STATES OF AMERICA

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED

I.

Did the Eleventh Circuit use the correct standard of prejudice in determining the Petitioner's *United States v. Booker* Sixth Amendment claim?

II.

Does a *Booker* constitutional error rise to the level of structural error?

III.

Is it reversible error if the sentencing court did not understand its discretion to utilize 18 U.S.C. 3553(a)(2) factors in sentencing?

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The Petitioner, Eduardo Saenz, respectfully prays that a writ of certiorari issue to review the judgement of the United States Court of Appeals for the Eleventh Circuit, entered in the above-entitled proceeding on March 14, 2006.

OPINION BELOW

The opinion of the Court of Appeals for the Eleventh Circuit is unreported (Case No. 04-11678) That determination is attached hereto in Appendix 1.

JURISDICTION

The judgment of the United States Court of Appeals for the Eleventh Circuit was entered on March 14, 2006. This petition for a writ of certiorari has been filed and docketed within the time prescribed. The jurisdiction of this Court is invoked under 28 U.S.C. §1291 and Supreme Court Rule 12.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, *by an impartial jury of the State and district wherein the crime shall have been committed*, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; *that have compulsory process for obtaining witnesses in his favor*, and *to* have the Assistance of Counsel for his defence.

18 U.S.C. § 3553 states in part:

(a) Factors to be considered in imposing a sentence. The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider--
(1) the nature and circumstances of the offense and the history and characteristics of the defendant;
(2) the need for the sentence imposed--
(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
(B) to afford adequate deterrence to criminal conduct;
(C) to protect the public from further crimes of the defendant; and
(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;
(3) the kinds of sentences available;
(4) the kinds of sentence and the sentencing range established for--
(A) the applicable category of offense committed by the

applicab[illegible]tegory of defendant as set forth in the guidelines--
(i) issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and
(ii) that, except as provided in section 3742(g) [18 USCS § 3742(g)], are in effect on the date the defendant is sentenced; or
(B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code, taking into account any amendments made to such guidelines or policy statements by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28);
(5) any pertinent policy statement--
(A) issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code, subject to any amendments made to such policy statement by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and
(B) that, except as provided in section 3742(g) [18 USCS § 3742(g)], is in effect on the date the defendant is sentenced.
(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and
(7) the need to provide restitution to any victims of the offense.

(b) Application of guidelines in imposing a sentence.
(1) In general *Except as provided in paragraph (2), the court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4) unless the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the*

Sentencing Commission in formulating the guidelines that should result in a sentence different from that described. In determining whether a circumstance was adequately taken into consideration, the court shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission. *In the absence of an applicable sentencing guideline, the court shall impose an appropriate sentence, having due regard for the purposes set forth in subsection (a)(2).* In the absence of an applicable sentencing guideline in the case of an offense other than a petty offense, the court shall also have due regard for the relationship of the sentence imposed to sentences prescribed by guidelines applicable to similar offenses and offenders, and to the applicable policy statements of the Sentencing Commission.

STATEMENT OF THE CASE

The Petitioner herein, Eduardo Saenz, was originally charged in a 3 count indictment charging him with conspiracy to possess and distribute five kilograms of cocaine, in violation of 21 U.S.C. § 846, and two counts of possession with the intent to distribute five kilogram or more of cocaine, in violation of 21 U.S.C. § 841(b)(1)(A).

The Petitioner was ultimately convicted of all counts. On March 29, 2004, the court sentenced the petitioner to 188 months, the low end of the Guideline range, after determining the amount of cocaine involved in the offense, that the Petitioner was an organizer/leader, and that the Petitioner had not accepted responsibility.

The Petitioner subsequently appealed his conviction and sentence to the Eleventh Circuit. In an unpublished opinion, the Eleventh Circuit denied the appeal in toto. The Petitioner then appealed up to this Court. (Case No. 04-1610) On October 3, 2005, the Court remanded for further consideration in light of *United States v. Booker*.

Upon remand to the Eleventh Circuit, the court ordered additional briefing. On March 14, 2006, the court entered an order finding that *Booker* constitutional error had occurred; however, the court found that such error was harmless, despite the fact that the sentence imposed was the minimum Guidelines sentence. (Appendix 1)

1. The Eleventh Circuit utilized the wrong standard in determining prejudice under a constitutional *United States v. Booker* error

The Petitioner submits that the Eleventh Circuit utilized an erroneous standard of review in determining that the Petitioner's Sixth Amendment claim was not meritorious.

The Petitioner did not raise a Sixth Amendment constitutional challenge to his conviction or sentence in the district court. Rather, he raised it for the first time on direct appeal. Thus, the Eleventh Circuit reviewed this claim under a "plain error" standard. The Eleventh Circuit ultimately determined that, because the Petitioner could not prove prejudice from the constitutional error, that no remand for resentencing was necessary. The Petitioner submits that, if this Court confirms that this issue may be reviewed under a plain error standard, that the Eleventh Circuit's standard is in excess of that required under law.

When a court remands a case under a plain error standard of review, the court must find that: (1) there must be error, (2) the error must be "obvious" or "plain", and (3) the error must have affected substantial rights. *United States v. Hughes*, 401 F.3d 540,547 (4th C. 2005) "An error does not affect substantial rights if the court is sure, after reviewing the entire record, that the error did not influence the jury or had but a very slight effect on its verdict." *Kelly v. Boeing Petroleum*, 61 F.3d 350,361 (5th C. 1995)

The Eleventh Circuit, in denying the Petitioner's *Booker* claim, did not use this standard. Rather, a fair reading of the Eleventh Circuit's opinion is that they presumed that the error did not affect substantial rights, and required the Petitioner to find something in the record to overcome that presumption. This is evident based upon the Eleventh Circuit's review of the sentence imposed. The Eleventh Circuit admitted

that the sentencing court imposed a sentence believing that the Guidelines were mandatory. The Eleventh Circuit also admitted that the sentencing court imposed a sentence at the bottom of the Guidelines. Despite this, the Eleventh Circuit found that the evidence was not clear, on the record, that the court would have considered a lower sentence.

In the case of *United States v. Domingez Benitez*, 542 U.S. 74 (2004), the Court explicitly recognized that although the defendant bears the burden of proving prejudice, in the context of plain error standard of review, that the defendant need only prove that "the probability of a different result is 'sufficient to undermine confidence in the outcome' of the proceeding." 542 U.S. at 83 (internal cite omit) The Eleventh Circuit's decision in the instant case, however, enhances this burden of prejudice, making it nearly impossible to prove prejudice without the sentencing court being clairvoyant as to the status of the Guidelines. The Petitioner submits that the Eleventh Circuit's plain error analysis is too stringent, and not supported by caselaw. On this basis, a remand is warranted.

The Petitioner would further note that other circuits have utilized a less onerous burden of proof in *Booker* plain error reviews. For instance, the First Circuit, in the case of *United States v. Aitoro*, 446 F.3d 246 (1st C. 2006), held that a remand was necessary, on a *Booker* claim raised for the first time on appeal, where there was "some chance that the court might have imposed a different sentence under an advisory Guidelines regime." *Id.* at ---

In the case of *United States v. Davis*, 407 F.3d 162 (3rd C. 2005), the Third Circuit, sitting en banc, determined that in assessing *Booker* claims under a plain error analysis, prejudice could be presumed, as "the sentencing calculus was governed by a Guidelines framework erroneously believed to be mandatory, the outcome of each sentencing hearing conducted under this framework was necessarily affected." *Id.* at 165

The Sixth Circuit has also come to a similar conclusion.

In *United States v. Barnett*, 398 F.3d 516 (6th C. 2005), the court determined that due to the type of error complained of in a *Booker* claim, "the inherent nature of the error made it exceptionally difficult for the defendant to demonstrate that the outcome of the lower court proceeding would have been different had the error not occurred." *Id.* at 527 According, the Sixth Circuit set forth a policy of rebuttable presumption that the error was prejudicial, putting the burden on the Government to disprove the presumption.

In sum, the Petitioner submits that he is entitled to a new sentencing proceeding, as the sentencing court believed that the Guidelines were mandatory, and imposed a sentence at the bottom of those Guidelines. The Eleventh Circuit's plain error standard is more onerous than is required under the law, and requires vacation of the decision in this case.

2. A Sixth Amendment jury trial deprivation is structural error

The Petitioner submits that, as the right to a jury trial is one of the fundamental rights guaranteed by the Constitution, that such violations are not subject to a harmless error standard of review.

This Court has defined a "structural error" as one which affects the framework of the proceedings themselves, rather than an error within the proceedings themselves. *Johnson v. United States*, 520 U.S. 461,468 (1997) Where such an error occurs, the defendant is entitled to relief, regardless of a showing of prejudice. *Id.* In *Johnson*, the Court set forth a list of errors which have found to be structural in nature, including: 1) deprivation of the right to counsel, (2) exclusion of certain race of jurors, (3) the right to impartial trial judge, (4) the right to a public trial, (5) the right to self representation, and (6) the right to a correct reasonable doubt instruction. *Id.* at 469

In the case of *Sullivan v. Louisiana*, 508 U.S. 275 (1993), this Court held that an erroneous jury instruction on

reasonable doubt was structural error, requiring reversal of the conviction despite the defendant's inability to prove prejudice. The Court noted that the "right to trial by jury in serious criminal cases to be fundamental to the American scheme of justice [] The right includes, of course, as its most important element, the right to h ve the jury, rather than the judge, reach the requisite finding of guilty." 508 U.S. at 277 (internal cite omit)

There can be no question but that the Sixth Amendment violation in the Petitioner's case was structural error, as the most important element of the right to trial by jury, having the jury decide the elements of the offense, was not met. The Petitioner was subjected to an enhanced sentence, based upon a Guidelines system that the sentencing court believed was mandatory, in violation of his Sixth Amendment jury trial right. Specifically, the Petitioner's sentence was enhanced based upon determinations made by the sentencing court, using a preponderance of the evidence standard, as to the amount of drugs involved in the offense, and the Petitioner's alleged leadership role in the offense.

The grand jury indicted the Petitioner on a specific offense. The Petitioner was entitled to have only those elements determine his guilt and punishment. The use of additional enhancing factors to increase by many years the sentence to be imposed is clearly a fundamental aspect of federal criminal procedure. As such, the violation of the Petitioner's Sixth Amendment jury trial right constitutes structural error.

The Petitioner would note that this Court has already heard oral argument in the case of *Washington v. Recuenco*. (Case No. 05-83) in April of this year, where the issue of structural error, in the context of a Sixth Amendment jury trial right violation was argued. The Petitioner submits that the *Recuenco* decision may well decide this issue for the Petitioner; therefore, at a minimum, this case should be held in abeyance pending disposition of the *Recuenco* case.

3. The sentencing court's failure to consult and use 18 U.S.C. § 3553 in determining a reasonable sentence is reversible error

Because the Petitioner was sentenced prior to *Booker*, the sentencing court was not aware of its discretion or its duty to consider all factors under 18 U.S.C. § 3553 in determining a reasonable sentence. This failure requires a new sentencing proceeding.

"Our first step in interpreting a statute is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case. Our inquiry must cease if the statutory language is unambiguous and the statutory scheme is coherent and consistent." *Robinson v. Shell Oil Co.*, 519 U.S. 337,340 (1997) "The plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole." 519 U.S. at 341

At the time of the imposition of the Petitioner's ;entence, 18 U.S.C. § 3553(b)(1) required imposition of a Guidelines sentence, unless certain aggravating or mitigating actors were present. Further, (b)(1) indicated that the factors sted in section (a)(2) were only to be given due regard "[i]n ıe absence of an applicable sentencing guideline". Thus, :cording to the unambiguous language contained in the atute, the (a)(2) factors were not to be considered by the ntencing court in imposing an appropriate sentence, as the ıidelines were in place.

Of course, this Court, in the case of *United States v. oker*, 543 U.S. 220 (2005), invalidated section (b)(1) of the 53 statute. However, that statute controlled the sentencing ırt in this case, and subsequently, the court could not

consider the 3553(a)(2) factors in determining a reasonable sentence. As the sentencing court did not consider these factors, a remand for resentencing is appropriate.

CONCLUSION

The Petitioner requests that this Court reverse the findings of the Court of Appeals and the district court, and remand for a new sentencing hearing.

Respectfully submitted,

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[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 04-11678
Non-Argument Calendar

D. C. Docket No. 03-20587-Cr-Gold

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
March 14, 2006
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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

EDUARDO V. SAENZ,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Florida

(March 14, 2006)

ON REMAND FROM THE
SUPREME COURT OF THE UNITED STATES

Before ANDERSON, BIRCH and MARCUS, Circuit Judges.

PER CURIAM:

This case is before us for consideration in light of United States v Booker, 543 U. S. 220, 125 S. Ct. 738 (2005). Saenz v United States, — U S —, 126 S. Ct. 321(2005). We previously affirmed Saenz' s sentence and conviction. See United States v. Saenz, No 04-11678 (11th Cir. Dec. 30, 2004) (per curiam).

Following Saenz's conviction, the probation officer recommended a two level adjustment to Saenz's base offense level. Saenz objected to the factual basis for the adjustment and, at the sentencing hearing, introduced expert testimony regarding the applicability of the enhancement in this case. R6 at 14-17, 23. The district court found, by a preponderance of the evidence, that Saenz was "not only a supervisor but was an organizer and leader" based on Saenz's decision-making authority concerning the transaction, including the price of the cocaine and the times and places of the meetings regarding the purchase of the cocaine. Id.. at 87. The district court also noted that Saenz was identified by one of his co-conspirators, whom the district court found credible, as the owner of the cocaine and that Saenz directed and supervised at least two associates, one of whom delivered the cocaine. Id. The district court observed that Saenz's witness had not reviewed the evidence and rejected his testimony as "speculation and conjecture." Id. On appeal, Saenz argued, inter alia, that the imposed sentencing enhancement as an organizer or leader was unconstitutional because it was based on conduct which had neither been submitted to the jury nor proven beyond a reasonable doubt, citing Blakelv v Washington, 542 U. S. 296, 126 S. Ct. 2531 (2004) and Booker. Because we had previously ruled held that Blakely did not impact the application of the Sentencing Guidelines, we held that the district court did not commit plain error Saenz, slip. op. at 20-21. The Supreme Court vacated our prior judgment and remanded for further consideration in light of Booker. Saenz, — U. S. at_, 126 S. Ct. at 321.

After remand, we directed the parties to file supplemental briefs providing us with: (1) a description of when, where, and how the Booker issue was first raised; and

(2) any arguments about whether and how the Booker decision applies in this case and what action should be taken. In supplemental briefing, Saenz argues that his sentence falls within both constitutional and statutory Booker error because his sentence was enhanced based on facts not supported by the jury's verdict or proved beyond a reasonable doubt. He maintains that he was prejudiced and notes that his sentence was at the bottom of the guideline range and that the district court's findings of fact were made under a preponderance of the evidence, instead of a beyond a reasonable doubt, standard. He also contends that the district court applied the Sentencing Guidelines as mandatory but commented that it was doing so with "some reluctance" and did not review all of the 18 U. S. C. § 3553 statutory factors.

Because Saenz raised the Booker issue for the first time on appeal, we review for plain error. United States v Rodriguez, 398 F. 3d 1291, 1298 (11th Cir.), cert. denied, — U. S. _, 125. S. Ct. 2935 (2005). Under plain error review, we will reverse only if "there is (1) error, (2) that is plain, and (3) that affects substantial rights." Id. The defendant does not meet his burden of showing that the error affected his substantial rights if we must speculate as to how he would have been sentenced without the error. United States v Williams, 408 F.3d 745, 748-49 (11th Cir. 2005) (per curiam). If the defendant is able to show that the three conditions are met, we may exercise our discretion to notice the "forfeited error, but only if (4) the error seriously affects the fairness, integrity, or public reputation of judicial proceedings." Rodriguez, 398 F.3d at 1298.

There are two types of Booker error — (1) a "constitutional" error of imposing a sentence enhancement based upon a judicial fmding that goes beyond the facts admitted by a defendant or found by a jury, and (2) a "statutory" error of imposing a sentence under a mandatory guidelines system. United States v Shelton, 400 F.3d 1325, 1330-31 (11th Cir. 2005). Under Booker, a constitutional error occurs when a defendant is subjected to "extra-verdict

enhancements used in a mandatory guidelines system." Rodriguez, 398 F.3d at 1300. Under Booker, a statutory error occurs when a defendant is sentenced "under a mandatory [g]uidelines scheme, even in the absence of a Sixth Amendment enhancement violation. "~United States v Mathenia, 409 F.3d 1289, 1291 (11th Cir. 2005) (per curiam) (quotation and citation omitted).

Following Booker, district courts must continue to consult the Guidelines in formulating a defendant's sentence and must correctly calculate a defendant's Guidelines sentencing range, United States v Jordi, 418 F.3d 1212, 1215 (11th Cir.), cert denied, — U S —, 126 S. Ct. 812 (2005), including the provisions addressing extra-verdict enhancements. Rodriguez, 398 F.3d at 1300. A resentencing proceeding would thus involve "exactly the same evidence presenting exactly the same factual issues. . .already resolved" and would require the district court "to at least consider exactly the same guideline enhancement provisions it has already applied" Id. at 1300-01.

Saenz satisfies the first and second prongs of the plain error analysis for both constitutional and statutory error because his sentence was enhanced, under a mandatory guidelines system, based on facts not found by a jury under a reasonable doubt standard but found by the district court under a preponderance of the evidence standard. There is no indication in the record, however, that this error affected the outcome of Saenz's sentence.

The district court commented that it had considered the evidence presented during the sentencing hearing and during the trial. See R6 at 85. It noted that it had considered the testimony of Saenz's coconspirator, Perez, regarding Saenz's offense conduct and found it credible. Id. at 87. Reviewing the law, the district court remarked that Saenz would qualify for an enhancement as organizer or manger if he had supervised merely one other person and that Saenz's role far surpassed that threshold. Id. at 86-87. The court recited that Saenz "had all of the decision-making authority concerning

[the cocaine] transaction and this conspiracy[], . . . set the price," "controlled the meeting places and times," "supervised and directed his associates," including the individual who delivered the cocaine, and that "all the transactions were completed" "through him." Id. at 87. Based on the district court's consideration of this evidence, Saenz is unable to satisfy the third prong. See Williams, 408 F.3d at 754-56 (declining to remand under a Booker plain error analysis where the witnesses's testimony and the district judge's commentary on the evidence and consideration of the Guidelines did not indicate a reasonable probability of a different result if the Guidelines had been imposed in an advisory manner); United States v Fields, 408 F.3d 1356, 1360 (11th Cir.), cert. denied, — U.S. —, 126 S. Ct. 221 (2005) (declining to remand under a Booker plain error analysis where the evidence established the sufficient number of supervisees for a manager or supervisor enhancement).

Further, Saenz cannot show that he would have received a more lenient sentence if the district court had considered the Guidelines in an advisory capacity. Saenz was sentenced to the lowest sentence within the appropriate Guidelines sentence range of 188-235 months. R6 at 90-91. The district court found that the 188 month sentence was "sufficiently punitive" but noted that Saenz's submission of an untruthful safety valve statement justified a "much higher" sentence within the Guidelines range.[1] Id. at 89, 90, 91.

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[1]Despite Saenz's argument, the district court's statement of "reluctance" was in sentencing Saenz to 188 months instead of a higher sentence although it believed that a higher sentence might have been justified. R6 at 91.

The district court expressed no doubt or hesitation about the propriety of the imposed sentence but only that it felt the sentence to be appropriate rather than merely mandated. Without more, Saenz is not able to show prejudice. See Fields, 408 F.3d at 1361 ("the fact that the district court went as low as it could under the mandatory guidelines system, without more, is [too speculative and is] not enough to carry that burden.")

Last, Saenz contends that the district court erred by failing to consider the factors enumerated in 18 U.S.C. § 3553(a) in calculating his sentence. Saenz failed to request specific findings on the § 3553(a) factors at sentencing, see R6 at 95, and did not raise the issue in the district court or in his initial brief on appeal, and the Supreme Court's remand instructions do not require us to consider new issues. We will not, therefore, consider it. [2] See United States v Dockery, 401 F 3d 1261, 1262-63 (11th Cir. 2005) (per curiam), cert. denied, — U S —, 126 S. Ct. 442 (2005).

Because Saenz is unable to establish that he would have received a lesser sentence if the guidelines had been adv sory, he is unable to show plain error in the district court's ser tence. We, therefore, reinstate our previous opinion in this case and affirm Saenz's sentence after our reconsideration m light of Booker, pursuant to the Supreme Court's remand.

OPINION REINSTATED IN PART, SENTENCE AFFIRMED.

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[2] We note, however, that the district court expressly commented that it had considered punishment in sentencing Saenz. R6 at 90-91; see United States v. Robles, 408 F.3d 1324, 1328 (11th Cir. 2005) (per curiam) ("[W]e would not expect the district court in every case to conduct an accounting of every § 3553(a) factor . . . and expound upon how each factor played a role in its sentencing decision.")